



ACQUISITION  
SOLUTIONS®

## Federal Supply Schedule Contracting

# A Guide to Considering Small Businesses When Using Schedules

By Catherine Poole and Paul Cataldo

*This Advisory addresses questions related to the use of socioeconomic preferences with federal supply schedule contracts and provides practical tips for ensuring appropriate application of the rules and regulations.*

**W**hat is the appropriate application of socioeconomic preferences when ordering via federal supply schedule contracts? Is it appropriate to set aside schedule orders for small businesses? These are questions we've heard repeatedly, in various forms, from our Virtual Acquisition Office™ (VAO) subscribers across the government.

This *Advisory* addresses the most frequently asked questions related to the use of socioeconomic preferences with federal supply schedule contracts and provides practical tips for ensuring appropriate application of the rules and regulations and avoiding potential "landmines."

Let's set the stage first with an overview of the Federal Supply Schedule Program and socioeconomic preference programs, in general.

### What is the Federal Supply Schedule Program?

The Federal Supply Schedule Program—also known as the GSA Schedules Program or the Multiple Award Schedules (MAS) Program—is operated by the General Services Administration (GSA); under the program, GSA's Federal Supply Service establishes groups of "indefinite-delivery" contracts with firms to provide commercial supplies and services to the government. Each group or category of contracts is called a "schedule." Schedule 70, for example, includes the contracts for information technology equipment, software, and services. There currently are more than 48 different schedules with thousands of different contracts.<sup>1</sup>

The intent of the program is to provide federal agencies with a pool of prescreened contractors with whom terms, conditions, offerings, and prices already have been negotiated. Simply stated, agencies can avoid the time and hassle involved with more complex procurement processes, and can limit consideration to only those contractors already available under a schedule contract. Orders placed against a multiple award schedule, using the procedures in Federal Acquisition Regulation (FAR) subpart 8.4, "are considered to be issued using full and open competition," as noted in FAR 8.404(a).

Because the contractors are prescreened and prices prenegotiated, the FAR (in part 8) allows a streamlined process, as follows:

- For fixed-price products or services (in which a statement of work is not necessary), FAR 8.405-1 requires the ordering activity to "consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three

schedule contractors through the GSA Advantage! on-line shopping service, or by reviewing the catalogs or price-lists of at least three schedule contractors.

- For services priced based on hourly rates (and thus for which a statement of work is required), “the ordering activity shall provide the [request for quotations] (including the statement of work and evaluation criteria) to at least three schedule contractors that offer services that will meet the agency’s needs.”
- For defense agencies and agencies ordering on behalf of the Department of Defense (DoD), Defense Federal Acquisition Regulation Supplement (DFARS) 208.405-70 imposes more stringent requirements. It requires that agencies either (1) provide a fair notice of the intent to purchase to as many schedule contractors as practicable to ensure the receipt of three offers, or (2) provide notice to all contractors that provide the supply or service under the applicable multiple award schedule.

The Federal Supply Schedule Program is without peer in terms of offering simplified, commercial-like buying practices on a mammoth scale to federal agencies. In fiscal year (FY) 2008, federal agencies placed orders exceeding \$36 billion under federal supply schedule contracts.

## What are small business programs?

In recognition of the important role small businesses play in the U.S. economy, the government has established an array of programs to help such companies grow and compete. Complementing the programs managed by the Small Business Administration (SBA), certain federal regulations and policies require and/or enable federal agencies to “steer” or “reserve” appropriate requirements to designated classes of small businesses. The government has a significant role to play in the growth of these firms, which ultimately power the country’s economic engine. FAR 19.201 conveys the government’s “policy”:

It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

### Small Business Act of 1953 (Public Law 83-163 and 85-536)

- Created the Small Business Administration (SBA) as an independent agency within the executive branch. Authorized SBA to make loans to small businesses.
- Directed SBA to provide technical and management assistance to small business concerns.
- Authorized SBA to enter into contracts with federal agencies, and then sublet those contracts to minority firms under section 8(a) of the act.
- Directed SBA to assist small businesses in obtaining government contracts.
- Directed inclusion of small business subcontracting clauses in all contracts over \$10,000.
- Required federal agencies to publicize all procurements over the small purchase threshold and those with subcontract potential.

Subsequent legislation has expanded small business requirements in federal acquisition.

Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity’s small business goals.

Source: FAR 8.405-5 Small Business

FAR part 19 provides extensive detail on the full array of small business programs that affect federal acquisition and the requirements for reserving or “setting aside” requirements for designated classes of businesses. Generally speaking, FAR part 19 provides that certain acquisitions can and should be specifically set aside—or reserved exclusively for small businesses.

A full discussion of these programs is outside the scope of this *Advisory* but will be covered in a future *Advisory*.

## Does FAR part 19 apply to GSA federal supply schedules?

No, it does not. FAR 8.405-5(a) is clear that the mandatory preference programs of FAR part 19 do not apply to schedule orders.<sup>2</sup>

What this means is that an order under a schedule contract should not be officially set aside for award to a small business. Outside the schedules program, FAR part 19 requires certain procurements to be exclusively reserved for small businesses or other types of concerns unless “there is not a reasonable expectation of obtaining

offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.”<sup>3</sup> FAR 19.501(1) describes and defines a “set aside” as follows:

The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A “set-aside for small business” is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses.

When an action is set aside for a small business, no other types of concerns can propose on the requirement.

Interestingly, the Acquisition Advisory Panel in its 2007 report recommended that “contracting agencies, including DoD, be given explicit discretion to limit competition for orders to [small business concerns].”<sup>4</sup> The MAS Advisory Panel did not address small business concerns in its draft list of recommendations made public in late June 2009.<sup>5</sup>

Until such time that explicit authority is granted, however, limiting federal supply schedule competitions to small business concerns opens what some might call a “can of worms.”

**TIP:** Don’t explicitly indicate in a federal supply schedule RFQ that it is set aside, limited, or reserved for small business. Instead, if you are seeking quotes from small (or other types of) businesses, simply provide them a copy of the RFQ and encourage them to submit a quote.

## Can we reserve or limit a schedule requirement for small businesses if we don’t call it a set aside?

While the FAR doesn’t specifically preclude it, it is generally not a good idea. Doing so opens the door to a variety of issues, which we address shortly.

In practice, we have observed that many agencies have “reserved” or “limited” schedule requirements for small businesses. In fact, many instances of such “limits” have been referenced in Government Accountability Office (GAO) protest decisions (more on this shortly).

Given that the FAR doesn’t preclude it and that its “guiding principles” encourage creativity, many agencies might be inclined to go this route as a potential means of increasing their small business awards. We advise caution, however, when following such a process, as there are at least two potential “landmines” here:

### 1. Size certification required?

First, reserving or limiting a schedule requirement for small businesses implies a more deliberative process, in which agencies may need to consider a contractor’s size *at the time of quote submission* (as opposed to relying on the size status in the contract).

While GSA has long held that the size status is the one reflected in the schedule contract, based on the size at contract award, SBA is of the opinion that when an agency reserves or limits a schedule requirement to small businesses, the contractor’s size is rightly determined *as of the date it submits its quote for the reserved order*. After all, if the agency is reserving the order for a small business, SBA holds that the agency’s intent is to ensure that the awardee will in fact be—currently—a small business. We address this issue in more detail shortly.

### 2. Not really a limitation?

Second, while you might express that you are reserving or limiting a requirement for a small or other type of business, the rules pertaining to schedule contracts require that you provide the request for quotations (RFQ) to any schedule contractor that requests a copy (per FAR 8.405-2(c)(4)), and that you “shall” evaluate all responses received, using the evaluation criteria provided to the schedule contractors (per FAR 8.405-2(d)). In other words, even if you indicate that you are reserving a schedule requirement for small businesses, you are required to evaluate responses submitted by others. This means that your “limitation” is not really a limitation. It is just an attempted limitation that savvy contractors can get around if they are paying attention.

**TIP:** Provide a copy of your RFQ to any schedule contractor that requests a copy of it.

**TIP:** You must evaluate all quotes received from schedule contractors, using the evaluation criteria provided to the schedule contractors.

A new GSA blog addresses this point:

FAR subpart 8.4 makes it clear that a large business could submit a quote in response to your task order RFQ—even if you only sent the RFQ to small businesses. You would then be required to evaluate that quote in accordance with the RFQ’s evaluation factors. FAR 8.405-2(c)(4) says: “The ordering activity shall provide the RFQ (including the

statement of work and evaluation criteria) to any schedule contractor who requests a copy of it.” In addition, FAR 8.405-2(d) states: “The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors.” You could then be in a real bind if you never even made socioeconomic status an evaluation factor. That is another reason why the selection and weighing of best value evaluation factors is very important on Schedule orders too.

Some ordering agencies persist in the view that they have authority to “set-aside” their Schedule orders (or Schedule BPAs) and reject quotes from large business Schedule contractors when no such authority exists in the FAR or in the Schedule contracts themselves. (Most of the Schedules are “Unrestricted” as shown on the standing solicitations at FedBizOpps. Note that the award of one service Schedule, 736 TAPS, is reserved for small business at the Schedule contract level. In addition, there are some SINS

**Table 1: Notable Relevant FAR Cites**

19.501(a) Defines “set-aside”	The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A “set-aside for small business” is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.
19.502-4 Provides guidance for conducting a set-aside	(a) Total small business set-asides may be conducted by using simplified acquisition procedures (see part 13), sealed bids (see part 14), or competitive proposals (see part 15). Partial small business set-asides may be conducted using sealed bids (see part 14) or competitive proposals (see part 15).  (b) Except for offers on the non-set-aside portion of partial set-asides, offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).
19.502-1 Provides guidance on setting aside acquisitions, exempting purchases from federal supply schedule contracts	(a) The contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses when — (1) It is determined to be in the interest of maintaining or mobilizing the Nation’s full productive capacity, war or national defense programs; or (2) Assuring that a fair proportion of government contracts in each industry category is placed with small business concerns; and the circumstances described in 19.502-2 or 19.502-3(a) exist.  (b) This requirement does not apply to purchases of \$3,000 or less (\$15,000 or less for acquisitions as described in 13.201(g)(1)), or purchases from required sources of supply under part 8 (e.g., Committee for Purchase From People Who Are Blind or Severely Disabled and federal supply schedule contracts).
8.404(a) Provides guidance on FAR part 19’s application to federal supply schedule orders and BPAs	Parts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to blanket purchase agreements (BPAs) or orders placed against federal supply schedule contracts (but see 8.405-5).
8.405-5 Addresses the consideration of small businesses when using federal supply schedules	(a) Although the mandatory preference programs of part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity’s small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.  (b) Ordering activities may consider socioeconomic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran owned small business, service disabled veteran owned small business, HUBZone small business, women owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and schedules e-Library at <a href="http://www.gsa.gov/fss">http://www.gsa.gov/fss</a> contain information on the small business representations of schedule contractors.  (c) For orders exceeding the micropurchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

Source: Federal Acquisition Regulation as of August 2009



on 520 FABS and 541 AIMS only awarded to small businesses.) [Acquisition Solutions note: A full listing of schedule contracts set aside for small businesses is provided in Table 3 on page 11.] Recall that FAR 38.101(e) says that Part 19 does apply on this issue at the GSA Schedule contract level, but not at the BPA/order level.

This consistent GSA position is sound and solidly based on the FAR. Ordering agencies comply with the FAR unless/until there is authoritative guidance to the contrary. (While it's possible that a court could someday adopt the contrary SBA position, that hasn't happened yet.)<sup>6</sup>

The GSA blog addresses the question, “Can schedule orders (and schedule blanket purchase agreements) be set aside for small business?” with a straightforward no.

### Can you provide more information about the size certification “landmine”?

Yes. The FAR guidance at 8.405-5 is pretty straightforward, providing that ordering activities “should rely on the small business representations made by schedule contractors at the contract level.” Thus, you can rely on the size representation indicated on both of GSA’s online tools—[GSA Advantage!](#) and the [Schedules e-Library](#)—which contain information on contractors’ representations of their size status, as of their last certification at the contract level.

As background, we note that the policy statement to rely on the contract-level certification is notable given the long debate in the community regarding the appropriate time and means of determining a schedule contractor’s size status. The issue—that many contractors considered “small” when their schedule contracts were awarded had long since outgrown their small status but still were receiving awards agencies could credit as going to a small business<sup>7</sup>—lingered for years in the schedules program. A November 2006 rule addressed this issue in part, requiring small businesses to recertify size status for long-term federal contracts—including GSA federal supply schedule contracts—prior to the beginning of the sixth year of a contract, and prior to each option thereafter.<sup>8</sup>

However—and here is the landmine—if an agency intentionally reserves a schedule order for a small business, it implies a more deliberative process that requires a de-

termination of the vendor’s size status as of the date of the quote.

### Why?

SBA and GAO consider each order under a schedule contract a “new” procurement, with a new size certification required if the agency has specifically reserved or limited the requirement to small businesses. Thus, the agency may request size certification at the time of quote submission, and the size certification must reflect the vendor’s status on the date of quote submission.

In one case where an agency limited consideration to small businesses but didn’t ask for a current size certification, a competitor protested that the awardee no longer was small. In such a circumstance, SBA assumes responsibility to consider a size protest and to identify whether the contractor is indeed currently considered to be a small business. The SBA decision issued in June 2004 stated—

Here, NSF . . . clearly state[d] on its first page that the procurement was limited to small businesses under GSA’s Schedule 70 contracts. This Office finds that by doing so, the NSF included language in its RFQ which was an express indication that the procurement was restricted to small businesses, and thus has elected to conduct a procurement restricted to small businesses. . . .

While it is true that FAR provides that the requirements of FAR Part 19 (Small Business Programs) do not apply to orders placed against the Federal Supply Schedules . . . it does not address the question of what happens when an agency elects to conduct a procurement restricted to small businesses who hold FSS contracts. Further, the FAR does not prohibit issuing an RFQ restricted to small business. . . .

When a procuring agency chooses to specify in the RFQ for an order that the award will be to a “small business,” it is reasonable for a potential quoter, or a member of the public, or the SBA, which alone determines a concern’s size status, to conclude that the procuring agency intends to assure that the awardee will in fact be currently a small business. Thus, where the procuring agency has taken this additional burden upon itself, the Administrative Judge holds that it is proper for an SBA Area Office to entertain a size protest concerning the awardee.<sup>9</sup>

This bears repeating: Limiting or reserving a schedule order strictly for small businesses implies a more deliberative process. While there is nothing to preclude you from explicitly limiting federal supply schedule orders to a small business, doing so may have unintended consequences.

**TIP:** If you decide to limit consideration to a small business, take steps to ensure the contractor is small as of the time of quote submission.

### Does the ordering agency have to ask explicitly for a recertification if it does limit consideration to small businesses?

No. And in fact, this is where things really get sticky. If the RFQ explicitly includes language that limits or reserves the purchase to small businesses, and a contractor submits a quote, the contractor is, in effect, with its submission, recertifying that it meets that size standard on that date of quote submission.

In the same case mentioned above, the judge concluded that “when a [federal supply schedule] procurement is restricted to small business by the express language in the RFQ, the firms responding to the RFQ are also reaffirming their original certifications that they were small, with the submission of their responses to the RFQ.” The lessons:

In a procurement restricted to small businesses on a [federal supply schedule] contract, an offeror’s size is determined as of the date it submits its quote in response to the RFQ.<sup>10</sup>

Where a procuring agency issues an RFQ for award of an order against the successful offeror’s [federal supply schedule] contract, and where the RFQ or the cover letter explicitly states that the procurement is limited to “small business,” any offeror that had certified that it is small when it submitted its original offer on the underlying [federal supply schedule] contract, renews its certification that it is small by submitting its response to the RFQ, even if it has not explicitly done so.<sup>11</sup>

We would venture to say that, in most cases, neither the ordering activity nor the contractor is fully aware of the implications of its actions. In other words, many ordering activities don’t necessarily realize that when they limit the requirement to “small” businesses, they are in effect requesting a current size certification, and the responding contractors most likely are not aware that their quote submissions serve as reaffirmation of their size status. The result? A situation ripe for protest.

### What is a reasonable course of action, without potential landmines?

Don’t explicitly indicate that you are reserving or limiting consideration to small business. Instead, if you are seeking quotes from small (or other types of) businesses, simply provide them a copy of the RFQ and encourage them to submit a quote. And, as detailed below, consider business size as an evaluation factor as opposed to a strict limitation.

### How can we consider small businesses when ordering via the schedules?

“Consider” is the key word here. FAR 8.405-5 provides that “ordering activities may *consider* socioeconomic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should *consider*, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s)” [emphasis added].

How to consider socioeconomic status without explicitly reserving a requirement for a small or other type of business becomes the question. One option is to use size status as an evaluation factor. In fact, this approach was endorsed by GSA in its June 6, 2005, Acquisition Letter V-05-12, which was extended in June 2009 through June 6, 2010.<sup>12</sup> In this approach, a business’s size status is a factor for consideration—among other factors—but the status as small or otherwise is not a firm “go/no go” criteria.

The GSA acquisition letter provides that “when the order is estimated to exceed the micropurchase threshold, ordering activities seeking to use the multiple award schedules program to achieve their agency small businesses goals may make socioeconomic status a primary evaluation factor when making a best value determination (see FAR 8.405-1(c)).” The letter indicates, “When a Request for Quote is issued it shall reflect that one of the primary evaluation factors is achieving the agency’s socioeconomic goals.”

**TIP:** One way to “consider” socioeconomic status on federal supply schedule buys is to use size status as one of your evaluation factors.

### Can you provide an example of size as an evaluation factor?

Yes, the following selection from an Environmental Protection Agency (EPA) solicitation for a BPA under GSA’s Mission Oriented Business Integrated Services (MOBIS) Schedule provides a good example of this approach:<sup>13</sup>

#### Socio-Economic Status

Socio-Economic Status of the Vendor shall be considered as a primary evaluation factor for award with the goal of achieving one of the Agency’s socio-economic goals. The following list details the preference level for each socio-economic goal sought through color ratings (as described under RATINGS):

Socio-Economic Status	Rating	Adjectival
Service Disabled Veteran Owned Small Business	Blue	Exceptional
8(a) Business	Blue	Exceptional
Women-Owned Small Business	Green	Good
HUBZone Small Business	Green	Good
Small Disadvantaged Business	Green	Good
Small Business	Yellow	Acceptable
Large Business	Orange	Marginal

EPA uses the following color rating system to determine the overall technical rating of each vendor's quote:

Rating	Adjectival	Description
Blue	Exceptional	Greatly exceeds all minimum requirements of the criteria; has a high probability of success; contains no weaknesses or deficiencies.
Green	Good	Exceeds all minimum requirements of the criteria; has an above average probability of success; contains no significant weaknesses and only minor, correctable weaknesses exist.
Yellow	Acceptable	Meets all the minimum requirements of the criteria; has an average probability of success; no significant weaknesses and any deficiencies can be readily corrected.
Orange	Marginal	Fails to meet one or more of the minimum requirements of the criteria; low probability of success; major weaknesses and/or significant number of deficiencies exist.
Red	Unacceptable	Fails to meet any of the minimum requirements of the criteria; proposal needs major revisions; very low probability of success.

We favor an adjectival or color rating system like this one over one that is point based, because a numerical methodology has the potential to average out ratings, offsetting weaknesses or deficiencies in one area with strengths in another. This can significantly constrain the evaluators in identifying the true impact of a particular approach or solution. However, the type of source selection system is less important than properly following whatever system is described in the evaluation criteria.

## Can we provide evaluation credit for specific types of small businesses?

Yes, in fact, the Department of Veterans Affairs (VA), for one, has used creative language that provides extra evaluation credit to veteran-owned small businesses, as well as extra credit to offerors that subcontract with veteran-owned small businesses, as a way to align its mission and its purchasing:

The VA will assign extra evaluation credit for an Offeror (prime contractor) which is a service disabled veteran owned business (SDVOSB) or veteran owned small business (VOSB). Firms which subcontract 7% or more of the contract value to a SDVOSB or VOSB will also receive extra evaluation credit. Substantiating documents such as teaming agreements and the like must be submitted with the price quote. This factor's information shall be included in the price proposal volume. The factor will be evaluated by the contracting officer.

## What if we receive identical quotes from a small and other-than-small business? Can we provide a preference for the small business?

Yes. The FAR is clear on this point. The only "preference" for a small business when ordering from federal supply schedules occurs when "two or more items at the same delivered price will satisfy the requirement." In this case, a preference should be given to the items of a small business concern. In other words, if a large and a small contractor submit a quote and both quote the same price for the same items, the FAR says the agency "should" give preference to the small business.

**TIP:** When two or more items are quoted at the same delivered price, provide a preference to the small business concern.

**TIP:** You can check the size of a schedule contractor on GSA Advantage! and in the Schedules e-Library. The size indicated is current as of the last size certification submitted at the contract level.

GSA e-Library allows you to display the vendor in each socioeconomic category within a particular schedule.

### Can an interested party protest that we should have set aside a requirement?

It can, but GAO is unlikely to sustain the protest, since federal supply schedule orders are not subject to the set-aside requirements of FAR part 19.

In a 2004 decision, GAO denied a protest in which the protestor argued that the agency's purchase from the federal supply schedules should have been set aside for small business concerns and that the agency's failure to do so violated FAR 19.502-2(b), which generally requires an agency to set aside acquisitions for small businesses when there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. GAO noted, "However, no statute or regulation required the agency to set aside this requirement for small businesses in lieu of purchasing from [federal supply schedule] vendors." It concluded that the provision at FAR 8.404(a)(1) "obviates the need for agencies to apply small business set-aside procedures, where, as here, they are purchasing from the [federal supply schedule]."<sup>14</sup>

### If an agency previously set aside a federal supply schedule requirement for small business is there any concern that the agency has set a precedent?

No. In fact this situation was addressed in a protest decision in 2006. In Global Analytic Information Technology Services (B-297200.3), the protestor asserted that an RFQ should be set aside for small businesses because it previously was issued on that basis. The protestor argued that, based on the principles of equity and fairness, when an agency initially competes a requirement as a small business set-aside, it should be required to complete the competition on that basis. GAO concluded:

The protest is without merit . . . the agency conducted this procurement as a [federal supply schedule] acquisition under FAR part 8.4. FAR § 8.404(a) specifically provides that FAR part 19 (Small Business Programs) does "not apply"

(except under circumstances not relevant here) to orders placed against [federal supply schedule] contracts. Thus, the agency was not required to set the requirement aside in the first instance, and was not precluded from subsequently resoliciting the requirement on an unrestricted basis. In this latter regard, we have specifically held that the FAR exempts task orders issued under [federal supply schedule] contracts from application of the set-aside withdrawal requirements found in FAR § 19.506. . . . The protestor's belief that equity and fairness dictate that the set-aside restriction be maintained under the reissued RFQ does not provide a basis for us to conclude that the agency was required to do so.<sup>15</sup>

**TIP:** Even if you have set aside or limited a previous federal supply schedule requirement to small business, there is no need to do it on a subsequent order.

### If the prior schedule order was awarded to a large business, are we required to resolicit the incumbent?

No, there is no requirement that an agency solicit the incumbent. In fact, GAO considered a protest on this issue in 2007. In that case, the incumbent asserted that in not furnishing the firm a copy of the RFQ, the agency improperly denied it an opportunity to compete for the agency's follow-on requirements. Because the agency followed the competitive procedures at FAR 8.4, which "satisfy the general statutory requirement for full and open competition," GAO concluded that "the applicable statute and regulations simply do not require an agency to solicit the incumbent FSS contractor."<sup>16</sup>

### Is a bundling analysis required when ordering under schedules?

Yes, a bundling analysis is required even when using schedules. While most of FAR part 19 is not applicable to orders under schedule contracts, FAR 8.404(a) makes it clear that the requirements at 19.202-1(e)(1)(iii), related to bundling analyses, are applicable. Bundling, as defined in the FAR, is the act of combining two or more existing requirements into a single solicitation when one of the requirements was or could have been performed by a small business and the solicitation will be unsuitable for award to a small business and the work will be performed in the United States. The applicable FAR cite reads as follows:



### 19.202-1 Encouraging small business participation in acquisitions.

Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

... (e)(1) Provide a copy of the proposed acquisition package to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) at least 30 days prior to the issuance of the solicitation if —

... (iii) The proposed acquisition is for a bundled requirement. (See 10.001(c)(2)(i) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification of contract bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107(e). When the acquisition involves substantial bundling, the contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

In a 2005 decision, GAO sustained a protest in which the agency failed to perform a bundling analysis. GAO noted:

The requirements that agencies perform a bundling analysis and notify the SBA when requirements are bundled were specifically made applicable to BPAs and orders placed against [federal supply schedule] contracts by a *Federal Register* notice published and effective October 20, 2003.

### When can an agency take credit for schedule awards to small businesses?

The agency can take credit only if the awardee “meets a size standard that corresponds to the work performed.”<sup>17</sup> Here is the complication: a contractor is not simply either “large” or “small.” Each schedule contract has GSA-assigned Special Item Numbers (SINs), each tied to a corresponding North American Industry Classification System (NAICS) code. Each NAICS code has a different standard against which a vendor's size is measured—some are measured in average annual receipts and others are measured by numbers of employees. A single contractor may have multiple SINs and multiple applicable NAICS codes, and may therefore be considered small for some requirements and large for others. Table 2 shows some examples of the SINs, NAICS codes, and corresponding size standards to be considered a small business under a specific schedule contract.

The FAR provision that allows an agency to take credit “only . . . if the awardee meets a size standard that corresponds to the work performed” restricts the agency from taking credit for award to a small business if the work performed relates to an area for which that same contractor would not be considered small.

**TIP:** An agency can take credit for award to a small business only if the awardee meets a size standard that corresponds to the work performed on that order.

**Table 2: Examples of SINs, NAICS Codes, and Corresponding Size Standards for Small Business**

Schedule	SIN	NAICS Code	Size Standard
874 Mission Oriented Business Integrated Services	874 1 Consulting Services	541611	\$7 million
70 Commercial Information Technology Equipment, Software, and Services	132 3 Equipment Rental and Leasing	532420	\$25 million
	132 8 Purchase of New Equipment	334111	1,000 employees
	132 32 Term Software License	443120	\$9 million
71 I Office Furniture	711 1 Furniture Systems and Workstation Clusters	337214	500 employees
23 Vehicle Leasing	751 1 Lease of Sedans	532112	\$23.5 million
03FAC Facilities Maintenance and Management	811 002 Complete Facilities Maintenance	561210	\$35.5 million
	871 201 Energy Audit Services	541330	\$4.5 million
67 Photographic Equipment	20 316 Cameras and Accessories	333315	500 employees

## Can an agency take credit for awards to 8(a) companies on schedule?

No. On June 30, 2007, SBA published an amendment to its 8(a) business development regulations to address when a business concern may receive orders as an 8(a) program participant under GSA's MAS Program and other multiple award contracts. SBA noted, "This final action is necessary to ensure that small business size status is accurately represented and reported over the life of these long-term Federal contracts."

The rule is clear that 8(a) credit cannot be taken on federal supply schedule orders:

In accordance with long-standing SBA policy, procuring agencies generally cannot take 8(a) credit on contracts that were not specifically set aside for exclusive competition among eligible 8(a) concerns. A Memorandum of Understanding (MOU) between SBA and GSA which allowed agencies to take 8(a) credit for orders awarded under full and openly competed MAS contracts expired in 2003. At this time procuring agencies should no longer be taking 8(a) credit for orders awarded under full and open MAS contracts. Thus, SBA's 8(a) [business development] program regulations will be amended to specifically delete language regarding size in the context of the MAS program, since SBA's size re-certification rule will apply uniformly across all small business programs.

GSA expounds: "There aren't any GSA Schedules (and GWACs are not Schedules) under which 8(a) firms are competing only against other 8(a) firms for award of a Schedule contract. As a result, SBA regulations hold that GSA Schedule contracts are therefore not '8(a) contract awards' within the meaning of the governing statute."<sup>18</sup>

On a positive note, however, "because all 8(a) firms are, by definition, Small Disadvantaged Businesses (SDBs) [but not all SDBs are 8(a)s], ordering agencies are free to take credit toward their socioeconomic objectives based on some other (that is, non-8(a)) socioeconomic status. In this way, award of a Schedule task order to an 8(a) contractor can help you meet your agency's SDB goals but not your 8(a) goals."<sup>19</sup>

## If we award to a small business against a GSA schedule contract, is the small business required to perform at least 50 percent of the work?

No. This is a common misperception, again based on a "mixing" of FAR part 19 set aside rules with FAR part 8, federal supply schedule rules.

### 52.219-14 Limitations on Subcontracting (Dec 1996)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for —

(1) **Services (except construction).** At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) **Supplies (other than procurement from a nonmanufacturer of such supplies).** The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) **General construction.** The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(4) **Construction by special trade contractors.** The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

The clause at FAR 52.219-14, "Limitations on Subcontracting," has requirements—see sidebar above—that specify the percentages of work that must be performed by the small business. However, this clause is only prescribed for use in small business set-asides (FAR part 19) and 8(a) contracts. (As we noted previously, set aside requirements do not apply to orders under federal supply schedule contracts.) The schedule contracts referenced in Table 3 on page 11, which have been set aside (or partially set aside) for small business at the contract level, do contain this clause; all others *do not*; and RFQs at the delivery or task order level should not. Therefore, the only time a schedule contractor has to comply with the limits on subcontracting requirement is on orders placed against these schedule/SINs.

All other (most) schedules are unrestricted, meaning there is no requirement to self-perform a percentage of the work and they can subcontract to a large business. There are other considerations that must be met: Work not covered under the schedule contract can't be subcontracted (of course) and the subcontractor has to meet the qualifications and experience requirements for the labor category.

## If we award a schedule order against an existing GSA schedule contract with an approved small business subcontracting plan, can we require more aggressive small business subcontracting goals at the task order level?

No, an ordering activity awarding a task order against an existing GSA schedule contract with an approved small business subcontracting plan *cannot* require more aggressive small business subcontracting goals at the task order level. The schedule contract contains the clause at FAR 52.212-4, “Contract Terms and Conditions—Commercial Items,” which states at paragraph (c):

Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

When an offeror submits a proposal in response to a MAS Program solicitation, this proposal includes a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business, service-disabled-veteran-owned small business, HUB-Zone small business, small disadvantaged business, and women-owned small business concerns. In accordance with FAR 52.219-9, “Small Business Subcontracting Plan,” this subcontracting plan is included in and made a part of the resultant contract. More aggressive subcontracting

goals would require a change that can be made only by written agreement of the GSA contracting office and the contractor. In addition, note that the small business utilization reporting by the contractor is cumulative against the schedule contract, and not the individual task orders.

## Conclusion

Ordering from federal supply schedules is an effective means of meeting the goals of full and open competition while also acquiring needed goods and services efficiently, following the guidance in FAR part 8. Where agencies often run into trouble with the use of schedules is when they—whether purposely or inadvertently—“mix” the rules of other FAR parts that simply don’t apply. Small business set asides are one such example.

Our recommendation? Keep it simple. Don’t set aside federal supply schedule orders for small businesses; don’t even reserve or limit them to small businesses, as this can have unintended consequences related to issues of current size status. Using the guidance and insight provided herein, keep your process simple, and “consider” size status appropriately but don’t make it a firm go/no go criterion.

We encourage agencies to leverage the best of what the schedules have to offer, and be smart with their competitive strategies, so they don’t introduce the possibility of unnecessary hassles into the process. ♦

**Table 3: Small Business Set-Asides at the Schedule Contract Level**

Schedule	Categories Set Aside	Description
23V — Vehicular Multiple Award Schedule	271 102 271 105	Snow Maintenance Equipment (Vehicle Mounting) Woodchipping/Shredders
36 — The Office, Imaging and Document Solution	20 220 47 147 40 180 51 101 7	Projection Screen, Stand, Printer (Enlarger) Systems Security Applications for Business Machines Time and Attendance Program Systems Transparency Film
48 — Transportation, Delivery and Relocation Solutions	451 3	Local Courier Delivery Services
520 — Financial and Business Solutions	520 10 520 14	Transportation Audits Audit & Financial Training Services
541 — Advertising and Integrated Marketing Solutions	541 3 541 4D 541 4E 541 4F	Web Based Marketing Services Conference Events and Trade Show Planning Services Commercial Photography Services Commercial Art and Graphic Design Services
56 — Buildings and Building Materials/Industrial Services and Supplies	361 01 361 20A 412 8	Scaffolding and Accessories Above Ground Storage Tanks Hard Wired Surge Protection and EMI/RFI Filtration Devices

66 — Scientific Equipment and Services	566 3 581 1 602 10 602 18 602 21 602 24 602 3 66 139 66 141 66 601 66 602 66 604 66 606 66 617 66 620	Special Purpose Laboratory Furniture Convertible Vertical Laminar Airflow, Biological Hazard Safety Cabinets Pressure Standards and Calibration Instruments Transducer Signal Conditioning Devices Load Pressure and Vacuum Transducers Panel Meters Amplifiers and Filters Environmental and Plant Growth Chambers Miscellaneous Laboratory Equipment Water Current Meters Seawater Sampling and Salinity Measuring Equipment Underwater Releases, Transponders, Buoys and Platforms Soil Temperature and Moisture Measuring Instruments Water Monitors Air Sampling Equipment, Automatic Gas Alarms
67 — Photographic Equipment and Related Supplies and Services	19 100	Photographic Services and Solutions
71 I — Office Furniture	711 12 711 14 711 4 711 92	System Type Tables Vertical Surface Attachment Panels Blueprint Filing Cabinets Remanufactured Furniture
71 II — Household and Quarters Furniture	71 202 71 203	Wall Units Loft Group
71 III — Special Use Furniture	71 304 71 306 71 308 71 312 71 317 71 321	Lecterns Mail Sorting and Distribution Furniture Cafeteria and Food Service Furniture Hazardous Materials Storage Convalescent Chair Correctional Institution Furniture
72 IA — Floor Coverings	31 302 31 501	Broadloom Carpet Mats and Matting
72 II — Furnishings	722 01 722 02 722 03 722 04 722 05 722 06 722 07 722 08 722 98 722 99	Lamps/Shades Window Treatments Bedspreads and Comforters Cubicle Curtains and Hardware Wall Art Artificial Trees and Plants Other Decorative Wall or Tabletop Accessories Optional Ancillary Services Overseas (International) Fabric Introduction of New Products
73 — Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services	302 34 302 42	Hot and Cold Food Counters Food Service Storage Racks and Cabinets
736 — Temporary Administrative and Professional Staffing Services	736 1 736 2 736 3 736 4 736 5 736 99	Administrative Support and Clerical Occupations Automatic Data Processing Occupations General Services and Support Information and Arts Occupations Technical and Professional Occupations Introduction of New Labor Categories
78 — Sports, Promotional, Outdoor, Recreation, Trophies, and Signs (Sports)	192 37B 402 5	Park and Recreational Tables, Benches, Outdoor Pool and Patio Furniture and Bleachers Awards



00CORP — The Consolidated Schedule	C 3610 C 7125A C 7460 C R422S C R708S C T001	Transparency Film, Laminating Equipment Shelving, Bookcases, Display Racks Card Files, Cabinets Market Research and Public Opinion Services Public Relations Services Arts/Graphics Services
------------------------------------	---	---

Source: GSA Schedules e-Library, based on a search conducted August 10, 2009

## Endnotes

- 1 A list of schedules can be found on the GSA Web site at <http://www.gsaelibrary.gsa.gov/ElibMain/scheduleList.do>.
- 2 Although, note that the notice requirement for bundling in FAR 19.202-1(e)(1)(iii) does apply, per FAR 8.404(a).
- 3 FAR 19.502-2.
- 4 "Report of the Acquisition Advisory Panel, to the Office of Federal Procurement Policy and the United States Congress," January 2007; [http://www.acquisition.gov/comp/aap/24102\\_GSA.pdf](http://www.acquisition.gov/comp/aap/24102_GSA.pdf).
- 5 Jason Miller, "MAS Panel finalizes recommendations for GSA," *Federal News Radio*, June 26, 2009; <http://www.federalnewsradio.com/?nid=35&sid=1705659>.
- 6 David W. Clemens, "Can Schedule Orders (and Schedule BPAs) Be Set-Aside for Small Business?" June 9, 2009; <http://blogs.gsa.gov/blogs/services-ordering.nsf/dx/No-Set-Aside-for-Schedule-Orders>.
- 7 To address this in part, in October 2002 GSA issued a FAR class deviation requiring GSA's contractors, particularly those participating in its schedules program, to recertify that they qualify as a small business each time their contract is open for renewal or an option to extend the term of the contract is about to be exercised. This ensures a more frequent certification as to "current" size status.
- 8 "Small Business Size Regulations; Size for Purposes of Government-Wide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations," *Federal Register* 71, no. 220, November 14, 2006; <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-19253.htm>.
- 9 Advanced Management Technology, Inc., No. 4638, (June 1, 2004); Docket No. SIZ-2003-11-25-71; SBA Office of Hearings and Appeals; <http://www.sba.gov/aboutsba/sbaprograms/oha/allcases/sizcases/SIZ4638.txt>.
- 10 Advanced Management Technology, Inc.; <http://www.sba.gov/aboutsba/sbaprograms/oha/allcases/sizcases/SIZ4638.txt>.
- 11 Advanced Management Technology, Inc.; <http://www.sba.gov/aboutsba/sbaprograms/oha/allcases/sizcases/SIZ4638.txt>.
- 12 "Socioeconomic Programs Under Schedules," GSA Acquisition Letter V-05-12, June 6, 2005; [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/V-05-12\\_R22J2R\\_025RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/V-05-12_R22J2R_025RDZ-i34K-pR.pdf), extended via Supplements 1, 2, 3, and 4, with the latest dated June 17, 2009, and expiring June 6, 2010; [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA\\_OVERVIEW&contentId=19589](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=19589).
- 13 Evaluation criteria available at [http://www.epa.gov/oamhpod1/admin\\_placement/ordsupport/eval2.doc](http://www.epa.gov/oamhpod1/admin_placement/ordsupport/eval2.doc).
- 14 Matter of: Future Solutions, Inc. (B-293194), Government Accountability Office, February 11, 2004; <http://www.gao.gov/decisions/bidpro/293194.pdf>.
- 15 Matter of: Global Analytic Information Technology Services, Inc. (B-297200.3), Government Accountability Office, March 21, 2006; <http://www.gao.gov/decisions/bidpro/2972003.pdf>.
- 16 Matter of: Allmond & Company (B-298946), Government Accountability Office, January 9, 2007; <http://www.gao.gov/decisions/bidpro/298946.pdf>.
- 17 FAR 8.405-5(a).
- 18 David W. Clemens, "Can Ordering Agencies Get 8(a) Credit on Schedule Orders?" July 31, 2009; <http://blogs.gsa.gov/blogs/servicesordering.nsf/dx/no-8a-credit>.
- 19 Clemens, "Can Ordering Agencies Get 8(a) Credit on Schedule Orders?" <http://blogs.gsa.gov/blogs/servicesordering.nsf/dx/no-8a-credit>.

The *Advisory* is published monthly as part of the Virtual Acquisition Office™ subscription service, made available by Acquisition Solutions, Inc., 1655 North Fort Myer Drive, Suite 1000, Arlington, Virginia 22209, 703-253-6300, fax 703-253-6301, [www.acquisitionsolutions.com](http://www.acquisitionsolutions.com). Information and opinions are based on best available information, but their accuracy and completeness cannot be guaranteed. Layout by Julie Oliver. Contents ©2009 by Acquisition Solutions, Inc. All rights reserved. Single copies and volume discounts are available from Acquisition Solutions, Inc.